

After reviewing the preliminary hearing record and considering the parties' briefs, the Board makes the following findings and conclusions:

On October 19, 2001, claimant was employed by respondent as a part-time custodian and light maintenance worker at the Blue Jacket Lodge, an apartment complex, managed by respondent. Claimant's job duties consisted of cleaning common areas, common restrooms, the community room and picking up trash. Light maintenance duties included plumbing and electrical repair. Claimant also occasionally helped contract carpet layers and paint contractors in moving large pieces of furniture in resident's apartments that were too large for the contractors to move themselves.

Claimant injured his right upper extremity on October 19, 2001, while assisting a paint contractor in moving a large entertainment center away from the wall in an apartment the painter was in the process of painting. The entertainment center became unbalanced as it was moved and started to tip over. As claimant grabbed the entertainment center, he felt a popping sound in his right arm.

Claimant sought medical treatment for the injured right arm on the day of the accident at a local hospital emergency room. The emergency room then referred claimant for further examination and treatment to Dr. Daniel J. Stechschulte, Jr. On November 15, 2001, Dr. Stechschulte first examined claimant. After the doctor examined claimant, he recommended claimant undergo a MRI examination of the right elbow and proximal forearm. But respondent's insurance carrier refused to pay for the MRI examination and denied claimant's claim.

Claimant testified he was instructed by Helen J. Powell, respondent's resident manager and his supervisor, to assist the paint contractor in moving the large entertainment center. Claimant also admitted that before he moved the entertainment center on October 19, 2001, that he had been instructed by respondent not to move furniture for residents. But claimant further testified he had not been instructed not to assist a contractor in moving furniture.

Claimant's supervisor Helen J. Powell also testified at the preliminary hearing. Ms. Powell testified that she did not instruct or suggest that claimant help the paint contractor move furniture on October 19, 2001. In fact, Ms. Powell testified that she and Carol Smith, respondent's property supervisor, who also testified at the preliminary hearing, had a meeting with claimant on August 29, 2001, and at that meeting specifically instructed claimant not to help residents move furniture in their apartments. The reason claimant was instructed not to help residents move furniture was the danger of damaging the furniture and to eliminate the prospect of the employee suffering injury. Ms. Powell, on cross examination, testified, however, that the paint contractor may have asked her where claimant was on October 19, 2001, the day of the accident, but such an inquiry was probably for paint or something else.

Respondent argues claimant injured his right arm while performing work specifically forbidden by respondent and, therefore, the injury did not occur during the course of claimant's employment with respondent and is not compensable.<sup>1</sup> Conversely, claimant argues he was prohibited by the respondent not to assist residents moving furniture or do other favors for residents. But claimant also argues that he was not prohibited from helping contractors move resident's furniture. Moreover, claimant argues that he was instructed by his supervisor to assist the paint contractor in moving the entertainment center at the time of his injury. Thus, claimant argues he was injured while performing assigned work in the regular course of his employment with respondent.

Where there is conflicting testimony, as there is in this case, the credibility of the witnesses is important in deciding the case. Here, the ALJ had the opportunity to personally observe the claimant and both of respondent's representatives testify before her. In granting claimant's request for medical treatment for his right arm injury, the ALJ apparently believed claimant's testimony over the testimony of respondent's representatives. Thus, the Board finds that some deference should be given to the ALJ's findings and conclusions because she was able to judge the witnesses' credibility by personally observing them testify. Therefore, giving some deference to the ALJ, the Board concludes, for preliminary hearing purposes, that claimant was not performing prohibited work at the time he injured his right arm and, therefore, his right arm injury is compensable.

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Julie A.N. Sample's January 24, 2002, preliminary hearing Order, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2002.

---

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant  
Michelle Daum Haskins, Attorney for Respondent  
Julie A.N. Sample, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

---

<sup>1</sup> See Hoover v. Ehrsam Company, 218 Kan. 662, Syl. ¶ 2, 554 P.2d 1366 (1976).